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* At 344 U.S., page 506, Justice Frankfurter said:

"When the record of the State court proceedings is before the court, it may appear that the issue turns on basic facts and that the facts (in the sense of a recital of external events and the credibility of their narrators) have been tried and adjudicated against the applicant. Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding***"

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1957

No. 59

Docket No. 24517

UNITED STATES EX REL.
HAROLD D. ROGERS

vs.

MARK S. RICHMOND, WARDEN

PETITION OF RELATOR FOR REHEARING.

LAWRENCE M. DOOLEY,
Public Defender of
New Haven County
Counsel for Relator

THE WHAPLES-BULLIS CO., NEW HAVEN, CONNECTICUT

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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES EX REL.
HAROLD D. ROGERS

vs.

MARK S. RICHMOND, WARDEN

PETITION OF RELATOR FOR REHEARING

On appeal by the State from the order of the United States District Court for the District of Connecticut in a *habeas corpus* proceeding vacating the death sentence imposed on relator Harold D. Rogers, this Court held that the "nature of the issue presented and proper regard for the delicate balance of federal-state relationships required the District Judge to obtain and examine the state proceedings at the outset of these proceedings." Although relator does not acquiesce in this holding for purposes of possible further appellate review by the Supreme Court, this petition for rehearing, filed pursuant to Rule 25 of the Rules of this court, does not challenge that holding, for relator's position has been clearly rejected. Rather it is the purpose of this petition to urge the court to reconsider that part of its opinion which deals with the remand instructions to the United States District Court—the specific holding that the trial judge must call for and consider all the relevant state court proceedings. In this petition relator requests the court to *a)* grant rehearing on the question of the District Court's discretion to supplement the state court findings with

the testimony taken at the hearing in the District Court and, *b)* to modify language in its opinion which might be construed as precluding the District Judge from finding that a "vital flaw" or "unusual circumstance" occurred in the state court proceeding which would justify the District Judge in contradicting an express finding of the state court.

I

ON A HEARING

At the initial argument of this case, relator relied heavily on the language of *Brown* vs. *Allen*, 344 U. S. 443 (1952) which indicates that the District Court may hold a hearing in a *habeas corpus* proceeding even though there was no "vital flaw" or "unusual circumstance" in the state court proceeding.[1] Reading *Brown* vs. *Allen* as a whole this court disregarded relator's reliance on this specific discretionary language because of what it felt was the Supreme Court's concern for federal-state relations. From the last paragraph of this court's opinion it is clear that this court reached that conclusion solely from the Supreme Court's consideration of No. 32, the only one of the three cases disposed of by the *Brown* vs. *Allen* opinion where the District Court made its decision solely on the basis of the state record. However, in

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[1]Relator relies on Justice Reed's statement that:

"Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required . . . However a trial may be had in the discretion of the federal court or Judge hearing the application."

Brown vs. *Allen*, *supra*, 463-464.

And on Justice Frankfurter's statement that:

"Unless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding . . ."

Ibid, 506.

Speller vs. *Allen*, No. 22, and *Daniels* vs. *Allen*, No. 20, the District Court did hold hearings on the factual issues of the proceeding even though they had before them the full record of the state proceedings. In both these cases the constitutional issues presented on *habeas corpus* had been determined in a hearing before the state court trial judge who had made specific findings on the issue. (*Daniels* vs. *Allen*, 344 U. S. 443, Brief of Respondent on Writ of Certiorari, p. 5 and *Speller* vs. *Allen*, 344 U. S. 443, Brief of Respondent on Writ of Certiorari, pp. 7 and 8). The findings were not merged in a general verdict, as in *Cramer* vs. *Gonzales*, 9 Cir. 226 F. 2d 83, cert. den. 350 U. S. 935. There is no suggestion that there was a "vital flaw" or "unusual circumstance" in the state court proceedings. Nowhere in the Court's opinion in *Brown* vs. *Allen*, despite the fact it is setting out guides for the federal court to follow in *habeas corpus* proceedings, is it suggested that the procedure followed by the District Court in these two cases tended to upset the balance of federal-state relationships.

There was no need for this court to transpose from the Supreme Court's language in the situation where the District Court held no hearing to determine what the Supreme Court's view would be when the District Court does hold a hearing. For Mr. Justice Reed, speaking for the court in *Brown* vs. *Allen*, specifically approved the propriety of the District Court holding a hearing in No. 22; although the District Court had the state record and there existed no "vital flaw" or "unusual circumstance" in the state proceedings:

> "The petition . . . raised again the same federal question which had been passed upon by both North Carolina courts and which had been offered to this court on petition for certiorari, racial discrimination. *The District Court heard all additional evidence the petitioner offered. This was in its discretion. Moore* vs. *Dempsey*, 261 U. S. 86; *Darr* vs. *Burford*, 339 U. S. at 214, cases which establish the

> power of federal district courts to protect the constitutional rights of state prisoners after the exhaustion of state remedies. *It better enabled that court to determine whether any violation of the Fourteenth Amendment occurred.*"
>
> *Brown* vs. *Allen*, *supra*, at 478 (emphasis added).

Relying on these comments of the Supreme Court directed specifically to a *habeas corpus* proceeding where the trial judge had in fact held a hearing, relator requests a reconsideration of this court's instructions that Judge Smith "should make the necessary determinations *exclusively* on the basis of the historical facts as found by the State Trial Court." Relator submits that insofar as this language indicates that the District Judge after considering the state record must erase from his mind all that transpired at the hearing he held, it is open conflict with the words of the Supreme Court in No. 22 in *Brown* vs. *Allen*, establishing the desirability of holding a hearing.

Even if the District Court may not contradict the state court's findings of basic or historical facts absent a "vital flaw" or "unusual circumstance" in the state proceedings, it should be free to hold a hearing to supplement the state court record if in its discretion it feels that a hearing "will better enable that court to determine whether any violation of the Fourteenth Amendment occurred."

This discretion in the District Court is essential if it is to properly fulfill its duties under the *habeas corpus* statute as interpreted in *Brown* vs. *Allen*.

As Justice Frankfurter points out, on mixed questions of law and fact and on the application of a constitution principles to the facts as found, the District Judge must exercise his own judgment. (*Brown* vs. *Allen*, 507). Since the District Judge *must* decide these questions, he should be able, in addition to studying the state records, to hold a hearing if he feels that having the witnesses before him will better satisfy him on any issue. For

example, in the instant case, the state denies that there is a causal relation between Captain Eagan's threat to bring relator's wife down to the jail and relator's confession. (Appellant's Brief, pp. 30 and 31) The District Judge must decide this issue. Therefore, he should be free to supplement his consideration of the evidence before the state court and the state court findings with a hearing if he feels it to be necessary.

The question now before the court is not whether the District Court should hold a hearing in this case. A hearing has already been held. The sole question raised in this petition is whether, having held a hearing, the District Court must disregard all the testimony these produced. This question cannot involve the federal courts in the "burdensome and useless repetition of effort" which Justice Frankfurter said was appellant's claim in No. 32 (*Brown* vs. *Allen*, at 504). Moreover, the testimony produced at the hearing is admittedly relevant to the issues to be decided by the District Court on the remand of this case; and concededly the entire proceedings were fair to the interests of the State of Connecticut. Justice demands that the information produced by the District Court's hearing be not ignored by that court for whatever help it affords in determining the issues left to its discretion by federal law.

II

THE VITAL FLAW AND THE BASIC FACT

This petition accepts, arguendo, that the District Court is bound by the basic facts found by the state tribunal—that is, specific findings of facts determined "by a recital of external events and the credibility of their narrators."—unless there is a "vital flaw" or "unusual circumstance" in the State proceedings. Relator urges this court to reconsider, however, the following portion of its opinion which might be used to preclude the District Court

from a complete determination of whether there is such a flaw or circumstance in the state court proceeding:

> "We can say that in our opinion nothing in this state record of appeal discloses such a 'vital flaw' in the State court proceedings or any such 'unusual circumstances,' as those terms are used in *Brown* vs. *Allen*, as would warrant the federal court in holding a hearing *de novo* on the issue of the admissibility of the confessions."

At the outset it should be noted that the basic facts argument is really a basic *fact* argument. The state complains that the District Court overruled six of the basic facts found by the State court. (Appellant's brief, pp. 6 and 7) It must be clear to this court, however, that facts number one, two and the first portion of four were not overruled by the court below. Facts numbered two, three and six are conclusions or inferences and "not a recital of external events." The basic facts argument, then, clearly refers to one fact: whether or not Rogers asked for counsel at the State's Attorney's office.

Rogers' testimony in the state tribunal in regard to his requests for counsel prior to Captain Eagan's arrival was uncontradicted. The State did not elect to challenge Rogers' testimony on this point with the available detectives until almost two and one half years after Rogers first testified. The fact that the State did not challenge Rogers' testimony dealing with occurrences from two to eight o'clock of the day in question is without dispute upon a consideration of the record below (59, 64, 66, 70). While this fact is not completely demonstrable from the incomplete state record which this court had before it, it will be evident to the District Court upon consideration of the full state court record.

This court does not specifically reject relator's theory of a vital flaw because the opinion states:

> "We can say that in our opinion nothing in *this state record of appeal* [record before Supreme Court of Errors] discloses such a 'vital flaw' in the State Court proceedings or any such 'unusual circumstances' . . . ."

In view of the fact that the *habeas corpus* proceeding record discloses that the State did not challenge Rogers' testimony at the state trial, relator requests this court to clarify its holding on this point to eliminate any possibility that Judge Smith will be precluded from finding a vital flaw in these proceedings on remand.

The state court's specific finding—that "the accused did not at any time on the day of the questioning request the presence or assistance of an attorney." (317) can only be upheld by saying that the court was free to disbelieve relator's testimony although it was uncontradicted. However, even in appellate review by the Supreme Court, the court would be free to go behind this finding, and to consider relator's uncontradicted testimony along with all undisputed facts. The Supreme Court states in *Gallegos* vs. *Nebraska* that:

> "As the court has been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, the proper performance of that duty requires us to examine, in cases before us such undisputed facts as form the basis of a state court's denial of that right."
>
> *Gallegos* vs. *Nebraska*, 342 U. S. 55, 61 (1951).
>
> ". . . [facts undisputed by the state] means not only admitted facts but also those that can be classified from the record as without substantial challenge."
>
> *Ibid*, 61.

And in *Lisenba* vs. *California*, 314 U. S. 219 (1941), the court held:

> "Where the claim is that the prisoner's statement has been procured by such means [has been induced], we are bound to make an independent examination of the record to determine the validity of the claim. The performance of this duty cannot be foreclosed by the finding of a court, or the verdict of a jury, or both. If the evidence bearing on the question is uncontradicted, the application of the constitutional pro-

vision is unembarrassed by a finding or a verdict in a state court . . ."

Lisenba vs. *California*, 314 U. S. 219, at 237-238.

The district court in a *habeas corpus* proceeding should at least have the scope of review which the Supreme Court has on appeal. But the District Judge should not have to rely on the evidence which was presented before the state court to make its new determination. In a situation such as that in the present case where the relator was held isolated, surrounded by state officials, the only evidence he can produce is his own words. When the state tribunal elects not to believe him, although the state does not call the only witnesses who could contradict him, there is an ambiguity which is a "vital flaw" or "unusual circumstance" as these terms are used in *Brown* vs. *Allen*. The District Judge must be able to hold his own hearing to determine whether or not the witness is credible. In these circumstances, just as this court pointed out was true in the *Cranor* case, justice will be better achieved by a procedure which permits observation of the witnesses. We respectfully ask this court to grant relator a rehearing, or to modify its opinion in accordance with this petition.

CERTIFICATE OF COUNSEL

I certify that the above petition is drawn in good faith—that to the best of my knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

LAWRENCE M. DOOLEY,
Public Defender of
New Haven County,
Counsel for Relator.

UNITED STATES COURT OF APPEALS

For The Second Circuit

No. 59--October Term, 1957

(Petition filed March 7, 1958 Decided March 13, 1958.)

Docket No. 24517

UNITED STATES ex rel. HAROLD D. ROGERS,

Relator-Appellee,

-v-

MARK S. RICHMOND, Warden,

Respondent-Appellant

On Petition for Rehearing

PER CURIAM:

Relator, through a petition for rehearing, has requested that we clarify our earlier opinion in this case in two respects.

Relator's first request concerns the following sentence in our opinion: "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court." He argues that this holding is contrary to Brown v. Allen, 344 U.S. 443, where Justice Reed indicated, page 478, that in one of the constituent cases there under consideration "[t]he District Court heard all additional evidence the petitioner offered. This was in its discretion." We think that by "additional" evidence, the opinion meant evidence material on the constitutional issue which the state trial court had excluded or as to which it had made no finding. To hold that by this dictum the Supreme Court meant to sanction unlimited discretion in the federal court on habeas corpus to take all evidence that the relator had already presented or could have presented in his trial, would be inconsistent with the rationale of Brown v. Allen.

Relator's second request is that we clarify our opinion so as to indicate that we did not wholly preclude the Judge below from finding a vital flaw in the state proceedings. Relator specifically refers to our sentence stating: "We can say that in our opinion nothing in this state record of appeal discloses such a 'vital flaw' in the State court proceedings or any such 'unusual circumstances,' as those terms are used in Brown v. Allen, as would warrant the federal court in holding a hearing de novo on the issue of the admissibility of the confessions." As the sentence shows, we limited our observation to the "state record on appeal." Nothing was said to insulate so much of the state trial record as was not included in the record of appeal from examination for possible flaws.

In no respect do we deviate from our original opinion.

Petition denied.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

-*-*-*-

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of March, one thousand nine hundred and fifty-eight.

PRESENT: HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

- x

U.S. ex rel Harold D. Rogers

Relator-Appellee

v.

Mark S. Richmond, Warden

Respondent-Appellant

- x

A petition for a rehearing having been filed herein by counsel for the relator-appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO

Clerk

UNITED STATES ex rel. HAROLD D. ROGERS,
Relator-Appellee,

v.

MARK S. RICHMOND, Warden,
Respondent-Appellant.

Docket No. [redacted]

MOTION TO RECALL AND STAY MANDATE

Pursuant to Title 28 USC §2101(f) and Rule 28 (c) of the rules of this Court, Harold D. Rogers, Relator-Appellee in the above-entitled action, does hereby pray that the judgment of this Court in the above matter be stayed in all respects and that the mandate be recalled and stayed in order that Relator-Appellee may petition the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court.

Counsel for Relator-Appellee

Relator-Appellee

Sworn to by Relator-Appellee
before me this 12th day of
March, 1958,

NOTICE OF MOTION

To: Abraham S. Ullman, State's Attorney for New Haven County
County Court House, 121 Elm St., New Haven, Conn.

Please take notice that the Relator-Appellee, Harold D. Rogers, will bring on the above motion for the consideration of this Court, by submitting it at the office of the Clerk, United States Court of Appeals for the Second Circuit, Federal Court House, Foley Square, New York City, on the 22nd day of March, 1958, or as soon thereafter as the Court can consider said motion.

[redacted]
Counsel for Relator-Appellee

PROOF OF SERVICE

I, Lawrence J. Bracley, counsel for Relator-Appellee in the above-entitled action, hereby certify that on the 18th day of March, 1976, I served the attached motion upon Abraham S. Ullman, counsel for Respondent-Appellants, by leaving a copy at his office, 121 Elm St., New Haven, Conn., with Arthur F. Gorman the person in charge thereof.

UNITED STATES COURT OF APPEALS

For the Second Circuit

- -

UNITED STATES ex rel HAROLD D. ROGERS,

Relator-Appellee,

v

MARK S. RICHMOND, Warden,

Respondent-Appellant.

- -

MOTION TO RECALL AND STAY MANDATE

Motion granted.

C. C. H.

J. E. L.

S. R. W.

March 28, 1958

UNITED STATES COURT OF APPEALS

Second Circuit

-*-*-*-

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of March, one thousand nine hundred and fifty-eight.

PRESENT: HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

U.S. ex rel. Harold D. Rogers,

Relator-Appellee,

v.

Mark S. Richmond, Warden,

Respondent-Appellant

A motion having been made herein by counsel for the appellee to recall the mandate and to stay its reissuance pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
OCTOBER TERM, 1957

CASE #59 DOCKET #24517

U. S. EX REL HAROLD D. ROGERS

VS

MARK S. RICHMOND, WARDEN

MOTION OF COUNSEL FOR RELATOR TO WITHDRAW APPEARANCE

Counsel for Relator desires to withdraw his appearance in the above matter in that the Relator, Harold D. Rogers, desires to apply for a Writ of Certiorari to the Supreme Court of the United States from the decision of this Court in the above matter.

Counsel for relator is Public Defender for New Haven County and as such has been unable to procure the necessary permission to proceed on the writ of certiorari under Section 333 of the Connecticut Practice Book.

WHEREFORE, said counsel desires to withdraw his appearance.

LAWRENCE M. DOOLEY
Lawrence M. Dooley
Public Defender, New Haven County
Counsel for Relator

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
OCTOBER TERM, 1957

CASE #59 DOCKET # 24517

U. S. EX REL HAROLD D. ROGERS

VS

MARK S. RICHMOND, WARDEN

AFFIDAVIT

I, Lawrence M. Dooley, being duly sworn, do depose and say:

1. That I am Public Defender for New Haven County in the State of Connecticut.

2. That I am counsel of record in the matter of U. S. ex rel Harold D. Rogers vs. Mark S. Richmond, Warden.

3. That under Section 333 of the Connecticut Practice Book I have been unable to secure necessary permission to proceed in this matter in a petition of writ of certiorari to the Supreme Court of the United States.

4. The relator, Harold D. Rogers, desires to institute an application for certiorari to the Supreme Court of the United States.

LAWRENCE M. DOOLEY

STATE OF CONNECTICUT)
) ss Branford 18th March, 1958
COUNTY OF NEW HAVEN)

Personally appeared before me the above named Lawrence M. Dooley, and made oath to the truth of the matters contained therein

MARJORIE S. BARCLAY
Notary Public

UNITED STATES COURT OF APPEALS

For the Second Circuit

- -

UNITED STATES ex rel HAROLD D. ROGERS,

Relator-Appellee,

v

MARK S. RICHMOND, Warden,

Respondent-Appellant.

- -

MOTION OF COUNSEL FOR RELATOR TO WITHDRA

APPEARANCE

Motion granted.

C. C. H.

J. E. L.

S. R. W.

March 28, 1958

UNITED STATES COURT OF APPEALS

Second Circuit

-*-*-*-

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of March, one thousand nine hundred and fifty-eight.

PRESENT: HON. CARROLL C. HINCKS,

HON. J. EDWARD LUMBARD,

HON. STERRY R. WATERMAN,

Circuit Judges.

- -

U. S. ex rel. Harold D. Rogers,

Relator-Appellee,

v.

Mark S. Richmond, Warden,

Respondent-Appellant.

- -

A motion having been made herein by Lawrence M. Dooley, Esq., to withdraw as counsel for the appellee,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. DANIEL FUSARO
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel HAROLD D. ROGERS, Relator-Appellee --v.-- MARK S. RICHMOND, Warden, Respondent-Appellant	No. 59, October Term, 1958 Docket No. 25527

MOTION FOR THE APPOINTMENT OF COUNSEL

On the annexed affidavits of Lawrence M. Dooley, counsel for Relator-Appellee as Public Defender for New Haven County, and Harold D. Rogers, Relator-Appellee in the above-entitled action, Relator-Appellee prays this Court to appoint Louis H Pollak, 127 Wall St., New Haven, Conn., or others, as counsel to prosecute an application for a writ of certiorari in the Supreme Court of the United States to review the judgment of this Court

Harold D Rogers, Relator-Appellee

Lawrence M. Dooley, Counsel for
Relator-Appellee

NOTICE OF MOTION

To: Abraham S Ullman, State's Attorney for New Haven County
County Court House, 121 Elm St., New Haven, Connecticut

Please take notice that the Relator-Appellee, Harold D. Rogers, will bring on the above motion for the consideration of this Court, by submitting it at the office of the Clerk, United States Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, on the 22nd day of March, 1958, or as soon thereafter as the Court can consider said motion

Lawrence M Dooley, Counsel for
Relator-Appellee

PROOF OF SERVICE

I, Larence M Dooley, counsel for Relator-Appellee in the above-entitled action, hereby certify that on the 18th day of March, 1958,

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
OCTOBER TERM, 1957

CASE #59 DOCKET #24517

U. S. EX REL HAROLD D. ROGERS

VS

MARK S. RICHMOND, WARDEN

AFFIDAVIT

I. Harold D. Rogers, Relator in the action entitled U. S. ex rel Harold D. Rogers vs. Mark S. Richmond, Warden, being duly sworn do depose and say:

1. That I desire to apply to the Supreme Court of the United State of America for a writ of certiorari from the judgment of the Second Circuit Court of Appeals an the above entitled matter.

2. That I do not have counsel to proceed with said matter.

3. That I am unable myself to proceed in said matter without said counsel.

4. That I am without funds to employ counsel.

COUNTY OF HARTFORD

STATE OF CONNECTICUT

Subscribed and sworn to before me this 18th day of March, 1958 personally appeared Harold D. Rogers and swore to the truth of the matters contained herein, before me.

Laura McDonald
Commissioner of the Superior Court

430

UNITED STATES COURT OF APPEALS

For the Second Circuit

- x

UNITED STATES ex rel HAROLD D. ROGERS,

Relator-Appellee,

v

MARK S. RICHMOND, Warden,

Respondent-Appellant.

- x

MOTION FOR THE APPOINTMENT OF COUNSEL

Motion granted.

C. C. H.

J. E. L.

S. R. W.

March 28, 1958

UNITED STATES COURT OF APPEALS

Second Circuit

-*-*-*-

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-eighth day of March, one thousand nine hundred and fifty-eight.

PRESENT: HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

- -

U.S. ex rel. HAROLD D. ROGERS,

Relator-Appellee,

v.

MARK S. RICHMOND, Warden,

Respondent-Appellant.

- -

A motion having been made herein by the appellee pro se for the appointment of Louis H. Pollak, Esq. of 127 Wall Street, New Haven, Connecticut, as counsel to prosecute an application for a writ of certiorari to the Supreme Court of the United States to review the judgment of this court,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. DANIEL FUSARO
Clerk

United States of America

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of [redacted] *for the Second Circuit,*

do hereby certify that the foregoing pages, numbered from 1 printed portions of

to 437 *, inclusive, contain a true and comp[redacted]cript of the record and pro-*

ceedings had in said Court, in the case of

United States ex rel [redacted] D. Rogers

Peti[redacted] Appellee

Mark S. Richond [redacted] Comm.
State Prison

[redacted]ondent-Appellant

as the same remain of record and o[redacted] office.

IMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3rd *day of* April

in the year of our Lord one thousand nine hundred and fifty-eight *, and of the Independence of the said United States the one hundred and* eighty-second.

A. Daniel Fusaro

Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES ex rel HAROLD D. ROGERS, Relator-Appellee,

—v.—

MARK S. RICHMOND, Warden, Respondent-Appellant.

No. 59-October Term, 1957

Docket No.24517

- x

MOTION TO EXTEND STAY OF MANDATE

Since pursuant to 28 U.S.C. Section 2101(c) Relator-Appellee in the above entitled action has ninety days from March 13, 1958, the date of this Court's denial of rehearing herein, to apply to the Supreme Court of the United States for a writ of certiorari, Relator-Appellee does hereby pray that the stay of the judgment of this Court, which is presently outstanding, be extended in all respects until the expiration of such ninety days, provided that upon receipt by the Clerk of this Court prior to the expiration of such ninety days of notice of the filing in the Supreme Court of an application for a writ of certiorari, the stay of mandate be further extended until the final disposition of the case by the Supreme Court.

Louis H. Pollak
Counsel for Relator-Appellee

Sworn to by Relator-Appellee before me this 18th day of April, 1958.

NOTICE OF MOTION

To: Arthur D. Gilhooley, State's Attorney for New Haven County
County Court House, 121 Elm St., New Haven, Conn.

Please take notice that the Relator-Appellee, Harold D. Rogers, will bring on the above motion for the consideration of this Court, by submitting it at the office of the Clerk, United States Court of Appeals for the Second Circuit, Federal Court House, Foley Square, New York City,

I served the attached motion upon Abraham S. Ullman, counsel for Respondent-Appellant, by leaving a copy at his office, 121 Elm St., New Haven, Conn , with Arthur P Gorman , the person in charge thereof

Kaan M Beardsley

UNITED STATES COURT OF APPEALS

Second Circuit

-*-*-*-

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of April, one thousand nine hundred and fifty-eight.

PRESENT: HON. J. EDWARD LUMBARD,

Circuit Judge.

- -

U.S. ex rel. Harold D. Rogers,

Relator-Appellee,

v.

Mark S. Richmond, Warden,

Respondent-Appellant.

- -

It is hereby ordered that leave to the relator-appellee to proceed in forma pauperis be and it hereby is granted.

A. DANIEL FUSARO
Clerk

on the 21st day of April, 1953, or as soon thereafter as the Court can consider said motion.

Louis H. Pollak
Counsel for Relator-Appellee

PROOF OF SERVICE

I, Louis H. Pollak, counsel for the Relator-Appellee in the above-entitled action, hereby certify that on the 13th day of April, 1953, I served the attached motion upon Abraham S. Ullman, counsel for Respondents-Appellants, by leaving a copy at his office, 121 Elm Street, New Haven, Conn., with JOHN A HOLTZ the person in charge thereof.

Louis H. Pollak

UNITED STATES COURT OF APPEALS

For the Second Circuit

UNITED STATES ex rel. ROGERS v. RICHMOND

Before HINCKS, LUMBARD and WATERMAN, Circuit Judges.

On Motion to Stay Mandate

PER CURIAM.

This court, in an opinion filed February 20, 1958 and a supplemental opinion on rehearing filed March 13, 1958, vacated the order below, entered in a habeas corpus case which set aside a murder conviction in the State Court of Connecticut, and remanded for further proceedings below. On March 28, 1958, we granted relator's motion for substitution of counsel and for stay of our mandate for a term which under Rule 28(c)(1) of this court was limited to 30 days. Relator now moves that we stay our mandate for 60 days more.

We feel that a wise use of discretion requires us to deny the requested stay. Even if the Supreme Court shall see fit to grant certiorari, we think a proper regard for the State Process requires that the proceedings on remand shall go forward, if the State's Attorney so desires, simultaneously with the relator's prosecution of his proposed application for certiorari so that whatever may be the ultimate disposition on certiorari the State process may not be unnecessarily delayed.

However, in order that counsel for the relator may have opportunity to apply to a justice of the Supreme Court for a stay, we will, and hereby do, order the mandate stayed for ten days. In all other respects it is

Ordered that the motion be denied.

/s/ Carroll C. Hincks

/s/ J. Edward Lumbard

/s/ Sterry R. Waterman

May 1, 1958 U.S.C. JJ.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of May, one thousand nine hundred and fifty-eight.

Present: HON. CARROLL C. HINCKS

HON. J. EDWARD LUMBARD

HON. STERRY R. WATERMAN

Circuit Judges

United States ex rel. Harold D. Rogers

Relator-Appellee

v.

Mark S. Richmond, Warden,
Respondent-Appellee

A motion having been made herein by counsel for the appellee to further stay the issuance of the mandate for an additional 60 days pending application for a writ of certiorari to the Supreme Court of the United States, and for other and further relief,

Upon consideration thereof, it is

Ordered that the issuance of the mandate be and it hereby is further stayed for an additional ten days.

Further ordered that in all other respects the motion be and it hereby is denied.

A. DANIEL FUSARO
Clerk

United States of America

SOUTHERN DISTRICT OF NEW YORK

I, A. DANIEL FUSARO, Clerk of the United States Court of Appeals for the Second Circuit,

do hereby certify that the foregoing pages, numbered from 4 *to* 446 *, inclusive, contain a true and complete* [illegible] *of originals thereof* on file *in said Court, in the case of*

United States ex rel Ha[illegible] Rogers,

Re[illegible] Appellee

ag[illegible]

Mark S. Richmond [illegible]n,

[illegible]espondent-Appellant

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th *day of* May *in the year of our Lord one thousand nine hundred and* fifty-eight *, and of the Independence of the said United States the one hundred and* eighty-second.

A. Daniel Fusaro

Clerk.

FPI EDC—8-15-57 500-6956

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